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Morison, J. (2015). Finding Merit in Judicial Appointments: NIJAC and the Search for a New Judiciary in Northern Ireland. In A-M. McAlinden, & C. Dwyer (Eds.), *Criminal Justice in Transition: The Northern Ireland Context* (pp. 131-156). Hart Publishing, Oxford.
<http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849465779>

Published in:
Criminal Justice in Transition: The Northern Ireland Context

Document Version:
Peer reviewed version

Queen's University Belfast - Research Portal:
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FINDING MERIT IN JUDICIAL APPOINTMENTS: NIJAC AND THE SEARCH FOR A NEW JUDICIARY FOR NORTHERN IRELAND

John Morison

Introduction

The post-Agreement constitutional architecture has produced a new legal space in Northern Ireland. While the court structure has largely endured in a recognisable format there are perhaps now new expectations of how it will function in the next stage of Northern Ireland's transition from a society in conflict. These expectations come into focus around the nature and role of the judiciary that is to oversee this new legal space. At the same time there are other, wider forces pressing upon the judiciary across the United Kingdom and these are being acted out in the various appointment commissions and regimes that have been created to modernise the judiciary. This all contributes to establishing a dynamic context for considering whether and/or how the judiciary in Northern Ireland is changing, and the forces that may be conditioning any change.

This chapter looks at some of the expectations that might arise for the judiciary. It focuses both on some ideas about what might be the role of a judge in a transitional context, and the debate about how judges generally should be appointed across the United Kingdom where the idea of "merit" emerges as governing concept. Next consideration is given to how this idea of merit plays out in the Northern Ireland context and, in particular, how it impacts on the appointment of women to senior judicial roles which has emerged as the central concern in the new dispensation. Here the chapter draws on two pieces of research: the first looking at the issues surrounding judicial appointments and attitudes towards seeking such posts in the Northern Ireland context, and a second project where the idea of "merit" as a governing factor in judicial appointment was further explored (Leith et al, 2008; Leith and

Morison, 2013).¹ Finally the chapter looks ahead at the challenges around judicial appointment that remain and suggests that notion of ‘merit’ has not provided the robust foundation which its proponents imagined it would.

Post Agreement Northern Ireland: A New Legal Space

Here the view is taken that the wider constitutional changes consequent on the Belfast Agreement have produced such significant changes and opened up such possibilities in the legal system generally that it is possible to consider this as a new legal space (Morison, 2013: 120-44). In part this new space has been created by a number of formal changes around devolution, and in particular the further devolution of justice functions (Anthony, 2011: 197-212). This has built upon existing structures and relationships which now, in a new context and with additional revisions, results in not only in the continuation of the separate formal jurisdiction but also a degree of “apartness” and exceptionality. The other sense in which a new legal space has been created is less formal and depends on a sense that the peace process here as elsewhere has brought an opportunity for a new start. Both of these must be considered in turn.

Prior to the major engineering works on the constitution in Great Britain, that is the Constitution Reform Act 2005, the judiciary in Northern Ireland operated with a strong degree of independence. This was true for the fifty year period of devolution and during the time of direct rule.² It has remained the case even after the peace process. The Northern Ireland Courts Service existed as a local branch of the Lord Chancellor’s Department, and although the Lord Chancellor was the formal head of the judiciary in Northern Ireland, a concordat negotiated in 1979 gave the Lord Chief Justice of Northern Ireland and his

¹ The first report was titled *Propensity to Apply for Judicial Office under the new Northern Ireland Judicial Appointments System: a qualitative study for the Northern Ireland Judicial Appointments Commission* (2008) and the second *Rewarding Merit in Judicial Appointments?* (2013). Both research reports can be accessed at www.nijac.gov.uk/index/what-we-do/publications/research.htm. The projects were funded by the NI Judicial Appointments Commission (NIJAC). (The author served as a Commissioner with NIJAC from its inception in June 2003 until June 2012, however the views presented here are made in a purely private capacity and should not be attributed to the Commission.) The author is grateful to all those involved in both research projects. This includes the members of the legal profession and judiciary who contributed to the surveys and interviews. It also encompasses the wider research team composed of Professors Sally Wheeler and Brice Dickson, Ms Lisa Glennon, and also Dr Marie Lynch and Ben Christman who provided research assistance, as well as the Project Steering Groups from NIJAC which included both Commissioners and NIJAC’s Head of Diversity, Ms Adeline Frew. Particular acknowledgement must be given to Professor Philip Leith who led the research teams in both projects and carried out an online survey in the second study. I am grateful also to Professor Leith for his involvement in the early stages of drafting this chapter, although he does not wish to be a co-author on this output from the project.

² See the contribution in this book by K McEvoy and A Schwartz.

extensive office operational control over the court system locally. The Constitutional Reform Act formally made the Lord Chief Justice head of the judiciary in Northern Ireland and settled this idea of the Northern Ireland jurisdiction being not only formally separate but also a place apart in the sense that it is organised and controlled locally (Gee et al forthcoming 2015).

The devolution of justice, made by the Department of Justice (NI) Act 2010 and the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, led to the establishment of the Northern Ireland Courts and Tribunals Service as an agency of the new Department of Justice within the Northern Ireland Executive (Northern Ireland Courts and Tribunals Service, 2010, 2013). This devolution of the machinery of justice into the care of the local political structures was not only the last piece in the puzzle of the peace process, and the final stage in the formal process of devolution, but a further recognition perhaps of a new chapter in the story of the legal system (Blackbourn, 2014). Although the framework has changed, arguably the separateness and independence continues – although now in very different circumstances of post ceasefire and economic retrenchment.

Other changes to the judiciary and the courts are more qualitative. They are less clear-cut and relate less to formal constitutional change. They impact perhaps more significantly on the fundamental nature and role of the judiciary in the new circumstances of a devolved Northern Ireland. Such change is perhaps of a political or cultural nature, and it mirrors much else in the wider peace process whereby a degree of ‘creative ambiguity’ allows opposing political perspectives to interpret change in their own way. For some there is a new legal system: an oath of allegiance to the Queen is no longer a requirement of appointment as QC, there is a new law officer in the shape of the Attorney General, and some of the existing senior appointments are distributed more widely across the political/ethnic spectrum than in the past. For others there remains a degree of continuity that confirms an idea that the legal system served Northern Ireland well in the difficult circumstances of the past and is well placed to do so in the future, with only a few modifications.

However these changes are interpreted, their origins lie with the Criminal Justice Review (CJR) launched on the foot of the Belfast Agreement (Criminal Justice Review Group, 1989, 2000). Much of the impact of the CJR certainly is focused on the judiciary. The CJR recognised that ‘an effective and impartial judiciary is crucial to the well-being of any society, especially one where there have been divisions and conflict such as have been

experienced in Northern Ireland’ (Criminal Justice Review Group, 2000: para 6.3). Throughout the history of Northern Ireland the administration of justice at whatever level and in almost any context – like many other issues - has been capable of being seen and interpreted as a political or even constitutional issue (Morison and Livingstone, 1995: chapters 3 and 4). The CJR acknowledged the need for manifest openness and fairness at every level if the court system was not to be seen as ‘owned’ and staffed by one community rather than the other. For those that saw the judges and the court system as inherently unionist it was vital that it be de-politicised while for those who did not accept this characterisation it was equally important that the new regime continued to establish this clearly.

The CJR anticipated also that judges in Northern Ireland increasingly would be called upon to interact with executive and legislative decisions. The Review predicted that in the new rights regime of the Agreement and the Human Rights Act 1998, judges would be not only weighing the merits of competing rights but also considering arguments about their economic and social impact (2000: paras 6.3-6.5). While the Review Group did not use language that specifically suggested that judges in the new Northern Ireland would be performing a different constitutional role, they did acknowledge a new constitutional reality whereby judges are ‘empowered to declare primary Westminster legislation incompatible [and] set aside lesser legislation, including Acts of a Northern Ireland Assembly... [as well as] determin[ing] whether individuals have been treated in accordance with Convention rights and whether acts of public authorities are in contravention of such rights’ (2000: para 6.6).³ While this constitutional role would not necessarily fall to all judges, at every level, it was something that was new and important.

Academic writers have developed more theoretical understandings of this new role, and assessed how this fits in with experience elsewhere. The present author undertook an ESRC funded project exploring how ‘constitutional litigation’ developed in the early days of the settlement and how this measured up to various new understandings of constitutional practice and theory internationally, particularly in what might be regarded as a transitional

³ In addition to ‘the Agreement cases’ discussed below, the emergence of a number of cases from the other devolved administrations (including *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 [15] and *Local Government Byelaw (Wales) Bill* [2012] UKSC 53, [2012] 3 WLR 1294 [80]) suggesting the possibility of fundamentally new understandings of the sovereignty of parliament in relation to devolution indicate the prescience of the CJR’s view.

context (Morison and Lynch, 2007: 105-146; see also Anthony, 2009). This study considered how the Northern Ireland transition could be seen in terms of a range of theoretical understandings. For example it may be considered as an outworking of a notion of a constitutional revolution occurring through the agency of a particular coalition of forces taking control (Balkin and Levinson, 2001), or gradual processes of change and consolidation across dominant sets of institutions or ideology (Tushnet, 2004). Ideas of transitional constitutionalism too are often directly invoked. Whereas traditionally constitutionalism is viewed as foundational and forward looking, transitional constitutionalism looks back to undoing problems of the past as well as laying foundations for the future (Teitel, 2000; McEvoy and Morison, 2003). It is also provisional, subject to revision, and contested, where the boundary between ‘ordinary’ and ‘constitutional’ politics becomes blurred. Such a description may seem to have purchase in Northern Ireland and require both a new constitutional practice and theory, particularly among the judiciary. It may require judges to use their power creatively ‘not to “block” democracy but to make it more deliberative’, as Sunstein describes it (2001). It may involve what Klare in the South African context describes as a ‘transformative constitutionalism’. (Klare 1998: 156). Dorf and Sabel have an idea of ‘democratic experimentalism’ which involves an idea of judges working with other constitutional actors to develop the future (1998).

All of these understandings of the Northern Ireland constitution, and the new society it is still in the process of creating, urge a new and very particular view of what it is that judges should be doing, and who they should be. The rights basis of what is fundamentally an agonistic settlement undoubtedly creates a new sort of legal space where decisions that are fundamental to *constituting* the post Agreement society are possible at any time and from almost any source.⁴ These ideas come in addition to wider debates about the changing nature of the judicial role generally in the context of a changing and globalising society (Robertson, 2010; Mak, 2013). They also join with the increasingly pressing concern about diversity on the bench and the need for modern judges to be drawn from as wide a background as possible. Arguments here encompass, broadly, equal opportunities, including accessing all available talent; democratic legitimacy; and the potential benefits of including different

⁴ It is characteristic of transitional societies in general that a whole range of matters are seen as central to how new societies are ‘constituted’ (see further Hart (2001) and the list of issues that the International Center for Transitional Justice takes within its remit at www.ictj.org). It is particularly the case in Northern Ireland, that almost any issue from housing to marching, flag flying to the siting of leisure centres is capable of being construed as a ‘constitutional’ one.

perspectives in the process of judging (Hale, 2001; Rackley, 2013: 501-519; Feenan, 2008: 490-519; Hunter 2015; Cahill-O’Callaghan 2015).⁵ This is a general concern in the United Kingdom and beyond but it has particular resonance perhaps in Northern Ireland where a new legal culture is being formed in the post-conflict context. Here all talents are necessary and welcome to ensure a legal space that is led by the widest pool of judges as possible. It is this issue of diversity that must now be addressed.

Judicial Appointments: The Search for Diversity Across the UK

Interest in the character and background of judges in general is as intense now as at any time since JAG Griffiths began to publish successive editions of *The Politics of the Judiciary* in 1977.⁶ It is possible to speculate about all sorts of reasons for this, even beyond Northern Ireland and its new legal space. Some of the attention may be due to the enhanced role of judges generally in the UK and in public law issues in particular. In the UK generally there is now increased debate over the future of the Human Rights Act 1998 and the role that should be given to judges (Commission on a Bill of Rights, 2012a, 2012b; Braver, 2014). The new Supreme Court too has alerted a wider public to the constitutional importance of judges and the prospect of a US style third branch of government emerging to determine significant aspects of public and private life. Interest in the process by which judges are appointed has become intense – whether as a symptom of the wider interest in judges or another cause of it.

The challenges facing each of the Judicial Appointments bodies that were founded first in Scotland in 2002, and then in Northern Ireland in 2005 and in England and Wales in 2006, have much in common.⁷ However, different emphasises exist in each jurisdiction, and within the particular legal cultures that pertain there. The devolution context provides a momentum for development in Scotland (and, as has been seen, to a degree, Northern

⁵ The arguments for a diverse judiciary, including more women, are extensively discussed, and put in a Northern Ireland context, by Feenan (2008: 490-519). Feenan concludes correctly that ‘seeing the issue only in terms of equality denies a much more complex field that requires understanding of the social construction of the judge, judging, and judicial authority, and the associated exclusion of outsider groups’ (2008: 518).

⁶ The final, fifth edition of *The Politics of the Judiciary* (London, Fontana) was published in 2010.

⁷ See the comparison of the various research projects under taken by all three bodies provided by the Judicial Appointments Board for Scotland (2009). See also some further possible challenges as identified by the House of Commons Political and Constitutional Reform Committee, *Constitutional role of the judiciary if there were a codified constitution* Fourteenth Report of Session 2013–14 (2014)

Ireland). In England and Wales (and to some extent in Scotland) the initial objective was to ensure an appropriate representation from women and from black and ethnic minorities, and there this theme has remained important.⁸ In Northern Ireland the focus historically was on recruiting a judiciary that would have the support of all sections of the community (which here means particularly catholic or nationalists since it was from this section of the population that support was historically missing).

Of course imperatives evolve and change. In Northern Ireland, the results of NIJAC's annual equity monitoring reports which began in 2007,⁹ and the conclusions of NIJAC's first research report (Leith et al, 2008) show, perhaps surprisingly, that the religion theme was not generally seen as particularly problematic. In fact the appointment of women has emerged as the most significant feature. Despite relatively good representation of women in the tribunal system and in the lower courts, the absence of a single woman in the High Court in Northern Ireland (at the time of writing) has proved a point of particular contention. In all jurisdictions there are also issues remaining about social class – although it is generally difficult to collect data that can reinforce a general perception that senior judges in particular are drawn from within a narrow social compass. The relatively well-worn complaint that appointments from the ranks of solicitors to the higher courts remains and is now joined by criticisms that lawyers working in the public sector are overlooked.

All of these concerns are contained within appointment systems that have avoided the more obvious forms of social engineering such as quotas, tie-breaks or schemes of positive discrimination. 'Appointment on merit' has been the supreme governing principle and the pole around which all processes have circulated.¹⁰ This reflects international best practice

⁸ The most recent Judicial Appointments Commission, *Statistics Bulletin* (2013) shows that while there has been a steady rise in the number of successful female applicants in England and Wales, the statistics for candidates from Black and Minority Ethnic (BAME) backgrounds have not shown any significant improvement on previous periods. Although the Scottish Judicial Appointments Board does not publish statistics about the background of applicants it does have a diversity remit and continues to monitor applications. It has conducted research on diversity issues, although this does not seem to be on-going (see the perhaps rather worryingly titled *Diversity Group Final Report* 2010).

⁹ eight years of reports can be found at www.nijac.gov.uk/index/what-we-do/publications/research.htm.

¹⁰ See, for example, Lord Falconer's foreword to the initial consultation paper 'Constitutional Reform: A New way of appointing Judges' (Department for Constitutional Affairs, 2003) where he insists that 'of course the fundamental principle in appointing judges is and must remain selection on merit.' (p.5). See also the response to the consultation by the Judges Council (available at www.webarchive.nationalarchives.gov.uk/). Here the Judges' Council maintains that that 'The reputation of our judiciary rests on the fact that it has predominantly been recruited from practising members of the legal professionand the fact that all appointments have been based purely on merit' (para 69) and 'the overriding requirement for any appointment body that the best candidates be appointed on merit' (para 80).

and a whole series of international declarations.¹¹ Every jurisdiction within the UK has enshrined this in legislation.¹² In the Republic of Ireland a high level review of judicial appointments, led by the Chief Justice has recommended that the merit principle be put into law there too (Judicial Appointments Review Committee, 2014).

It is interesting however that the initial near universal support for new processes, and for the merit principle, is now beginning to fracture. Even among the legal profession (where merit was initially thought to be essential to ensure their support) and with others who might be thought to have an interest in the wider policy aims of providing a transparent process, there are some who now take a hostile view of the processes, and the concept of merit has been at the centre of this revolt. Recently the voices of dissent have become louder and divisions have appeared within the senior legal profession and judiciary itself.

Lord Sumption, a former England and Wales Judicial Appointments Commissioner, on his appointment to the Supreme Court, gave a lecture to the Law Society in which he argued that the pool for appointment of judges is ‘dominated by white males’ (2012). For Sumption an important part of the problem is the issue of merit. Although appointment on merit is essential to retain the quality and attractiveness of the bench to the best candidates, it does not, in his view, allow selection with a view to altering the make-up of the judiciary as a whole. The result of this, he argues, is that in the absence of positive discrimination (to which he is opposed) it will take at least fifty years to achieve even ‘a reasonably diverse judiciary’. It appears that ‘merit’ in Sumption’s view currently lies – for whatever reason – with white males.

Lord Hacking, a leading practitioner, has taken issue with how merit is measured by the JAC, particularly through its lay membership. He claims that the lay commissioners cannot

¹¹ See, for example, Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Recommendation No. R (94) 12 of the Council of Europe’s Committee of Ministers on the Independence, Efficiency and Role of Judges (see www.wcd.coe.int/ViewDoc.jsp?id=524871&Site=CM); and the Venice Commission (2010).

¹² In England and Wales S. 63(2) of the Constitutional Reform Act 2005 provides that ‘selection must be solely on merit’. In Northern Ireland, S. 5(8) of the Justice (Northern Ireland) Act 2002, as amended by the Justice (Northern Ireland) Act 2004 provides that ‘the selection of a person to be appointed, or recommended for appointment, to a listed judicial office (whether initially or after reconsideration) must be made solely on the basis of merit’. In Scotland, S. 12 of the Judiciary and Courts (Scotland) Act 2008 which provides that ‘selection must be solely on merit’. See also Gee and Malleison (2014).

have the benefit of knowing each candidate closely from years of working together in legal practice. Hacking, maintains that he is reflecting the dismay of the wider legal profession as he complains about the Judicial Appointments Commission approach to merit and the ‘humiliating’ role of ‘rigorous essay writing, formal presentations and two lengthy formal interviews’ in finding a new Lord Chief Justice of England and Wales (2013: 27). This insider perspective offers an interesting viewpoint and it is one that sees merit as something that is clear and demonstrable – but only to those in the know.

A counter to these has been Lady Hale who in a recent speech has suggested that ‘as some of us have always known, it is not enough to get the appointments process right, though that is hard enough. We have to get the definition and assessment of merit right too and that is much harder’ (2013). Unfortunately, Hale does not provide a view of just what any definition of merit should be except to suggest that it should not necessarily include high quality advocacy.

Jack Straw, former Lord Chancellor and Minister of Justice, also sees merit as of central importance. He takes issue directly with Sumption’s idea that merit and diversity are in some way to be seen as mutually exclusive and pitted in opposition to each other (2013: 67). Reflecting on the introduction of the current appointments system, Straw maintains that it may have been naïve to believe that if the system were changed then outcomes would be different. Importantly, however, he does not see the problem as being about how merit is created and operationalized. Straw recognises that ‘merit is an empty vessel which needs careful filling: merit can too easily mean “people like us”’ (2013: 71) (which follows perhaps the Hacking view). Indeed, Straw continues, ‘appointing “on merit” does not necessarily result in the most meritorious, or best, candidates being appointed.’ There are, he argues, several possible reasons for this: it may be because the best candidates are not applying; or because something is going wrong in the process. Alternatively, it may be ‘because merit has been wrongly defined’. Straw derides the idea of an unrealistic, illusory concept of merit – a league table of brilliance - which is always perfectly distinct and measurable. This is a view with which it is possible to concur enthusiastically. However Straw then goes on to develop an argument for increasing diversity that rather undermines this important insight and demonstrates perhaps the limits of ‘solely on merit’ approach. He suggests that faced with two equally meritorious candidates in a tie-break situation it may sometimes be necessary to achieve a balanced judiciary to favour a candidate from an under-represented group. This is

all very well but it hardly offers a route to a more balanced judiciary. More importantly, however, it begs the question of what is actually meant by ‘equally meritorious’? That in itself suggests that there is some way in which merit can be scored in an absolute manner, and certainly does not provide an alternative view of what might constitute merit.

The diverse views on merit from a range of ‘insiders’ reveals the centrality of the concept to judicial appointments and how it acts as a lightning rod for a wide variety of other concerns. It is however Lady Hale and Jack Straw’s initial insight about the very nature of merit that resonates most with the views that the research uncovered in Northern Ireland. However here the problem is not only about finer judgements of merit, and the possibilities of bringing in diversity among the equally meritorious, but about how the very idea is created by a case based system, conditioned by experience at the bar, determined by seniority and maleness, and policed by a judiciary who may see meritorious candidates looking as much like themselves as possible. As shall be discussed now, there exists very real scepticism about how merit is defined and used in the appointments process. This is particularly widespread within female perspectives inside the legal profession, and it is here that its impact is most obviously marked. This must cause some concern as we move forward towards establishing a judiciary appropriate for the new circumstances in Northern Ireland.

What Does ‘Merit’ Mean in Northern Ireland?

It is known that women do not do well in the higher judicial appointment competitions even though they are often well qualified.¹³ It is known also that ‘merit’ is something that most insiders agree is an essential requirement for judicial appointment, although there are some serious concerns about how it is working.¹⁴ In the second of two pieces of research undertaken for the Northern Ireland Judicial Appointments Commission¹⁵ the focus was placed particularly on testing through quantitative and qualitative methods whether ‘merit’ as

¹³ It is not just in UK that the problem whereby the higher levels of judicial office are dominated by male office holders is particularly found. This has been discussed by Cheryl Thomas, where she comments that ‘... recent research by the European Social Affairs Commission, which showed that women clearly succeed in gaining judicial appointments where competitions are anonymous and the criteria for appointment are knowledge based, not experience based. The data in Italy (and France) bear this out. Sixty percent (60%) of successful applicants to the Italian judiciary are women for entry-level competitions that are purely knowledge-based and almost completely anonymous. However, after entry women find progression to the senior ranks, where appointment is increasingly experience and seniority based, extremely difficult. Only 7.9% of all senior judicial positions in Italy are held by women’ (2005: 67; see also Thornton, 2007).

¹⁴ For further discussion on this see the list of senior figures decrying the current situation in the UK provided by Rackley (2013: 501-502).

¹⁵ See n. 1 above for full details.

presently understood is in fact the cause of these problems. This project was thus designed to elicit views on the nature of ‘merit’; how it is perceived and how it might be changing. The project used both an on-line survey with a variety of vignettes or stories to elicit views from respondents, and a more traditional series of interviews and focus groups. The findings which relate particularly to merit can be enunciated quite briefly:

1. Merit – in the sense of having the qualities needed for being a good judge - was often defined by respondents more widely than meaning simple technical legal expertise combined with court experience at the higher level. Frequent mention was made of qualities of empathy and judgement, case management, good listening skills and experience as well as problem-solving.
2. There was a general view that merit in this sense could be found in non-traditional candidates and judicial appointments could and should be made from a broad range of individuals where this idea of merit could be found in.
3. The current view of merit used in the appointments process was quite widely seen as based on qualities mainly possessed by the bar, and to be based on seniority and experience of advocacy in court. Judges were thought to reinforce this view of merit and ensure its dominance in the appointment process. Women generally believed themselves less likely to be seen as having this sort of merit or indeed have the opportunities to gain it.
4. There were very considerable differences in attitude between male and female respondents, particularly in regard to the nature of merit required for the High Court. Women respondents were generally much more favourable to non-traditional backgrounds being seen as meritorious.
5. While barristers were most likely to see merit in traditional terms, there was a significant number who acknowledged the wider view of merit.
6. The more encompassing view of what constitutes merit was widespread among solicitors and, particularly, lawyers in public service.
7. While there was some recognition that lower courts and tribunals were beginning to accommodate a wider range of talent, there was generally a considerable amount of scepticism that merit is being rewarded at the High Court appointment level, and this was seen as a particular problem.

Although the project was undertaken in Northern Ireland there is little reason to believe that many of the findings on gender are not relevant to other jurisdictions.¹⁶

¹⁶ For discussion of international appointments, see Mackenzie, Malleson and Sands (2010); Schultz and Shaw (2013) and Thomas (2005).

The Research Study Findings

The NIJAC study on merit has two elements. The first involved an online survey where six vignettes were created to highlighted issues of gender, age, familiarity to senior judges, part-time working, solicitor-barrister division, type of practice, and family responsibility which might be thought relevant to appointment to judicial posts. (See further Leith and Morison 2013 and Leith 2013). Overall those responding to the survey seemed prepared to see merit in a wider sense than often is traditional in the appointments process. Although there were degrees of conservatism from many who answered the survey, particularly over age and status, female respondents were more favourable towards non-traditional candidates than were men. There were however many who felt that meritorious candidates may not be recognised within the system as it operates presently but that this is not necessarily the fault of NIJAC processes as such but rather a failing of the wider legal system which sustains the current view of merit.

The second element of the research – and the one upon which this account concentrates – relates to series of interviews and focus groups that was carried out by the author with individual practitioners from both branches of the professions at various levels of seniority. There were some women only focus groups and focus groups drawn from lawyers working in the public sector. In all about sixty individuals took part. Generally the views elicited from the scenarios were confirmed in the focus groups. Merit was seen generally as more than simple technical legal knowledge. As one barrister expressed it, ‘knowing the law is just the start ... the merit principle needs to be broadly defined to include a wider range of skills, and disentangled from experience in the traditional sense.’

There was however considerable variation expressed as to what *exactly* merit might mean and how it could be evidenced. For some, this was clearly related to the sort of work that an individual might have before appointment. Often focus group respondents, particularly from the bar, took the view that a mixed, high-end practice provided the best basis to demonstrate merit. Criminal law was mentioned frequently as important and so too was judicial review and high value chancery work which was thought to provide an opportunity to demonstrate the requisite attributes. However, this linking of merit to particular kinds of work was not universally held. It was suggested that complexity and difficulty might be found in all sorts of areas of law. As one barrister saw it, ‘anyone dealing

with children's cases, freeing orders ... social security cases are the hardest cases that I read, dealing with really complex law ... chancery cases ... anyone who can do that has the intellectual ability to do the job [of a judge] – provided they are given the training in evidence and so forth'.

If an applicant's case load were mainly in the High Court with occasional visits to the Court of Appeal or even the Supreme Court or Strasbourg this too was seen as significant. As a barrister pointed out, 'how else do you demonstrate merit except if you can do the more difficult cases?..'. In part this seems to be because the standard of practice is generally agreed to be higher in the higher courts. As one relatively new QC put it, 'You do learn from higher level courts ... everyone gets better, you get better, the questions get harder ... and you learn about how to behave in court'.

This view was, however, far from universal, and indeed respondents not from the bar, tended to express doubts about the extent to which specific sorts of cases in particular courts demonstrated merit as opposed to some sort of prestige. It was in fact a senior barrister who told us, 'It's about kudos ... often high value cases are straightforward, easy, they can be a penalty kick ... and murder is not the most complex crime ... it is not depth or quality it is about kudos'. This view was supported enthusiastically by a public sector lawyer who expressed the view that 'if you can handle ... industrial tribunal cases ... equal value ... indirect discrimination you can handle anything that is likely to come up in the High Court ... you would be very unlucky in the high court to come up against anything as complex'. Similarly social welfare law was mentioned as a complex area where skills developed there would be transferable to a senior court appointment, although generally it was not thought to be seen as such.

Merit and the Bar

The interviewees generally agreed that merit is more likely to be seen as existing within a bar practice. This view was not unique to barristers but also noted in a more critical way by those not at the bar. Indeed a solicitor at partner level expressed the view that 'the solicitors' profession is at the bottom and people want to keep them there'. From the barristers' perspective, however, it was felt that the high profile of court work brought particular value, and showed merit very clearly. As one moderately senior barrister put it, 'our skills are as

advocates... if you have cross-examined witnesses on a day and daily basis this is an appropriate skill for a judge.’ Another barrister went further in seeing the importance of advocacy for judicial office saying ‘you need to have experience with advocacy so you can see when the wool is being pulled over your eyes’. Indeed generally experience of court work over a sustained period of time and at a reasonably high level was felt, particularly by some barristers, to be the most effective – if not indeed the sole - way of demonstrating merit for judicial office. This experience was seen (by some barristers) to be unique to the bar and it meant that identifying merit was relatively straightforward. As one barrister put it simply, ‘the most successful practitioners are the most successful judges. They have demonstrated that they know the law.... and get on with colleagues ... and if females have got on despite the obstacles [then they too must have merit].’

However, it would be inaccurate to see this view of merit as being bar-oriented as universal to barristers. The more senior bar appeared more willing than juniors to find merit beyond their ranks. One senior barrister told us, ‘There are two examples of judges ... who have come from the solicitors’ profession and they are excellent judges’. However the same respondent went on to say, ‘but the bar think that we have a particular set of skills that make us good judges ... our skills are more transferable’. This view was expressed more trenchantly by younger barristers with one in a focus group insisting, ‘There is a difference between a barrister and a solicitor ... they [solicitors] routinely sit behind the junior and senior counsel ... they have all sorts of opinions but they don’t have to ask the questions, put themselves on the line’. While it may not be entirely clear how this translates into the judicial role, barristers generally did represent their work as closer to that of the judge than other lawyers.

Of course there are consequences to such a view and those (particularly non-barristers) who did not share the bar-orientation were fully alive to them. One of these is that a bar-oriented focus on merit meant that other important skills were being overlooked. A solicitor said:

Some [barristers] are very good at paperwork, at drafting an opinion or the black and white letter of the law but that doesn’t necessarily translate to them being good in a court situation, having to weigh up pros and cons, deal with the people in front of you and decide if someone is credible or not.

It was a moderately experienced public sector lawyer who expressed the view that:

A fairly homogenous group are describing themselves to themselves, and, although you have a fair and transparent appointment process, the way in which a candidate is described will favour someone who has a traditional, mixed private practice ... if you go into any public voluntary or public sector [body] you find people are doing things that are very different ... and yet you will be exercising very relevant skills.

Indeed it may be that not all skills relevant for judicial appointment are developed in a private practice at the bar, and that to see it in this way misses other important attributes. As a partner in a firm of solicitors remarked: ‘A lot of them are good advocates but that doesn’t make them a good judge ... a good judge is the opposite, not a spin doctor ...’. Another public sector lawyer pointed out that: ‘the judicial skill set and the private practice skill set are not necessarily exactly the same. You need things that people from non-traditional backgrounds can bring ... case management, managing staff ... you need people who have these skills’.

Merit and Seniority

There was also a view that merit was most likely to be found with senior practitioners – those with many more years of experience than the formal requirement for most judicial posts. This view was fairly widely held but seemed particularly prevalent among barristers. Indeed it was a senior barrister who said:

We need the very best people who have dealt with high value cases, been to the Court of Appeal, Strasbourg, dealt with difficult and complex cases and only if you have done this are you really good enough to demonstrate the sorts of skills [for the High Court].

This view, that experience often far in excess of the minimum required is important, reinforced the idea of a ‘pecking order’ for judicial appointment that was discovered in the earlier research (Leith et al, 2008: 13-14 and 97-98). Here again the idea emerged that the bar (mainly) but the legal profession in general, would have some idea of who was ‘worthy’ and who should be next on the bench. For example, an interviewee said, ‘there would have been quite a bit of disapproval if [XX] hadn’t got it ... There are appointments that are seen as surprising because the bar know how those people perform in court but the judicial appointments commission can’t’. Views of this sort also tied into more general criticisms that ‘outside’ bodies could not be expected to be alive to the pecking order. For example, the view was expressed that ‘competence based [appointment] works in England and Wales

where there are a lot of people ... but we are still a small enough jurisdiction, and people know each other and know their reputation'.¹⁷

There were of course other views. Many of those interviewed were willing (at least in theory) to look for merit where it could be found. As one barrister said:

Does experience equate with age? ... I know people who have done 12 or 13 years of work at the very highest level and others who have been pootering around for 25 years and more and will never do the same level of work.

Others confirmed that it is the nature and quality of work that which is important, and this is not the same as simple length of service: it may be possible to obtain sufficient experience of work at the appropriate quality in a short period. There were several respondents who were very aware of the consequences of equating merit with seniority. As one senior practitioner put it, 'there are no High Court judges who are work-shy but there is an expectation that you are going to work harder in your sixties than you did even in your twenties that is unusual'. This was felt to narrow the applicant pool to those who maintained an energy and enthusiasm about continuing the long hours, hard work culture that had put them in the position where they may be seen as meritorious. It was also seen as potentially limiting the pool yet further as it was felt by some that such a decision about extending one's active working life may well be one that men would find easier to take than women for a whole host of reasons relating to caring responsibilities and life patterns. It was in fact a senior male barrister who made the point that:

If you become a high court judge in your late fifties you are probably thinking about working until you're seventy ... if you are a man you would find it easier to make a decision about working on in a high pressure job until you are seventy.

Merit as Male

Of course this view that merit may most often be associated (at least by some people) with practice at the bar, with a particular sort of caseload and obtainable only with a degree of experience has other consequences too. The view was expressed that women were less likely to be able to offer merit of this sort. Frequently it was mentioned how difficult it is for women to avoid being channelled into family work. Respondents expressed a divergence of view as to whether the necessary experience could be attained in family law as opposed to

¹⁷ As the same respondent put it, 'in Northern Ireland, we kind of know who is "right"'.

other sorts of work. However many respondents did take the view that this channelling of women into family law, and the uncertain status of the skill sets there, has the consequence that any merit that may be displayed there is likely to be overlooked in favour of other forms of merit that can be observed more easily in more 'mainstream' work. For some respondents this was a result of the nature of the work. As one respondent put it, 'there's not a lot of law in family law' echoing the view found in the earlier research about the status often accorded to 'chick law' (Leith et al, 2008: 23, 56 and 61). However other interviewees took the view that there was rather a different skill set, and it was one that was just as valuable in evidencing merit for judicial appointment. For example, a QC who practiced only rarely in the family court reported an experience of seeing a female barrister in action: 'I was in court and was blown away by her advocacy skills but judges don't see her ... I thought it was a lot more difficult ... a very limited number of judges see them... and they are held in private'.

Indeed, the view was expressed quite strongly that this pigeon-holing of women combined with the way in which merit is seen may have the effect that it is difficult for women to present themselves as having the same degree of merit. As one interviewee said, 'if you have criminal experience, that is the gold standard... family law experience is not what is wanted ... and the vast majority of those, barristers and solicitors who practice criminal law are male, and there you are...'. Indeed female respondents, as well as some males, were very keen to make the point that generally female merit is something different, and does not seem to be transferable. As member of one focus group put it, 'the requirement to succeed is that you must think just like a man, you must act like a man ... be as good as a man'.

Some of female respondents were anxious to report that it is often particularly difficult for women to emulate this male model of merit. There are wider factors which may make it more difficult for women to progress in the same way. These include not only the diversion of women into family law specialisms and sexist briefing patterns at the bar but also some structural factors. There was a view expressed by female respondents, and not generally contradicted by male respondents, that men were better able to pursue the informal networks that can lead to success. For example, on focus group respondent said:

men can stay on here [the bar library] and then go home to a cooked dinner, the kids in bed, and go straight into the study... they can hang around here ... do their work in the library ... networking in a an informal way ... they can run into someone in the servery or on the stairs.. and get worked passed on.

In contrast women talked of the difficulties of managing careers and families. As one female barrister put it, ‘... I have watched my male peers at the bar advance far beyond me... they have good wives at home’. There was general agreement that a lot more networking goes on among male practitioners, particularly at the bar: ‘... [I]t’s not what you know, it’s very much the golf and the rugby’.

There is, however, a view that this may be changing – albeit at a very slow pace. There was some mention of the feminization of the legal professions at the lower levels but also something about the emergence of a cohort of women lawyers who are more ambitious than their predecessors. It was also thought that the general move to specialism in legal practice may in fact facilitate this development. However, even the most enthusiastic heralds of change of this sort recognised this as both a very uncertain and long term process, and as a reaction to the continuing male dominance of the legal profession rather than a more fundamental change in its nature. As one interviewee expressed it, ‘the women are adopting a male way of succeeding ... but the system, the way of succeeding, needs to be changed’.

Merit Policed by Judges

The idea of merit being bar-influenced and in large part male is conditioned and reinforced, according to many of interviewees, by the role that they see the existing judges playing as gatekeepers to judicial appointment. As one barrister respondent reported,

those on the bench see the skill sets they bring as being the ones that are needed .. it is an advocacy skill set by and large. .. Judges have the view that the profile we [barristers] have represents what a good judge is.

From the perspective of some barristers this was not a problem. Indeed, it may be seen as good thing – particularly if the view of merit being bar focused is accepted. However solicitors in particular often expressed the view that their skills were being overlooked because the judges controlled the idea of merit and viewed it in relation to barristers’ skills. There may even be wider considerations at play reflecting the perceived status of the two branches of the profession. It was in fact a barrister who made the comment ‘How the judiciary address solicitors in courts compared to how they address barristers, particularly QCs..... this all helps to perpetuate the hierarchy... a lot of the bar would feel this...’.

Many see the existing judiciary playing an undue role in determining appointments. This is indirect, in terms of validating certain understandings of merit, and even sometimes more direct. It was a solicitor who reflected a fairly common view of the consultee or referee process involving the existing High Court bench that is required for some senior posts when he commented that:

The High Court still have their black balling, if I can put it like that ... all applicants have to be known to people on the High Court either personally or professionally ... whenever you have that criteria – that discriminatory criteria – it sends out huge signals that we want to keep it to ourselves or pull up the drawbridge when we have the right people on our side.

The processes and indeed structures of NIJAC, including alternative consultee arrangements and the presence of the lay commissions, were treated with varying degrees of scepticism. One respondent asked, ‘Do all the commissioners carry equal weight? Do the judicial commissioners have more say? Can they say he appeared in front of me last week and he’s no good?’ Another expressed a more unequivocal view: ‘NIJAC doesn’t work: it is a front, there is still a tap on the shoulder approach’.

The High Court – and the Absence of a Woman in the High Court - as a Focus for Concern

Although this research was interested in the range of judicial appointments it was immediately fairly clear that the position in the High Court established the tone for the whole judicial appointments system. When it was mentioned to respondents that the balance of men and women was moderately healthy in proportion to the applicant pool in some of the lower courts and tribunals this was sometimes dismissed. As one respondent said, ‘a lot of people don’t consider those to be judicial offices lower down the judicial ladder it is easier [but] the High Court sets the scene’. Another solicitor respondent put the situation more directly:

You just have to look at the High Court. They perpetuate themselves, they just want more of them up there. They don’t want diversity. You only have to go along to a function with High Court judges and they are all there in their dark grey suits ... no women sends out the wrong signals.

Indeed it was the absence of women in the High Court (at the time of the research) that coloured all conversations about merit at every level in the judiciary. It would be difficult to exaggerate the significance that is attached to the absence of a woman judge in the High Court which remains the case up to the middle of 2015. Unfavourable comparisons were frequently made with the Republic of Ireland with more than one respondent pointing out

that Northern Ireland is many years behind its neighbour in this regard.¹⁸ There was however a general recognition that this absence of female High Court judges was an intricate issue which required a complex solution. As a senior barrister put it:

Self-evidently the problem is that there are no women on the High Court bench but if you are just trying to design a process that is going to [appoint a woman to the high court] for its own sake, how is this going to be a good process?

Fear of a tokenistic appointment was wide-spread. Some respondents recognised the problem as far-reaching. It was said:

Until more women advance in the profession, both branches of the profession, you will not see a woman in the High Court there is a lack of assistance to women to succeed in the legal profession ... we need something more general and systemic ... it can't be left to the endeavours of some one individual.

There was considerable speculation in the conversations about what sort of individual might be the first to take the role. A female barrister made the observation that,

the last thing any woman wants is to lead the charge ... because we all know what will be said - "You are only there because of your gender" and that would be a nightmare to work through. We all know it is said of women judges on the bench now.

A fairly common theme, particularly among female respondents, was one which stressed the challenges of being the first female in this role. Mention was made of 'the considerable chill factor of going into a club of 14 or 15 men'. Another respondent said that the '... the back corridor can be seen as a very special sort of club ... and that club atmosphere might very well put off anyone who is not an iconoclast from applying'. One thought from a female barrister was that 'maybe we would need to have two or three appointed at the same time' to overcome the perceived difficulties. However there was a view strongly expressed, particularly among female respondents at the bar that such a candidate could and would be found. For example, one interviewee said: 'She exists ...the High Court bench is not full of dinosaurs. There are many High Court judges would more than welcome a woman colleague, and would be welcoming and supportive'.

¹⁸ According to the Irish Judicial Appointments Review Committee, over 30% of judges are female which represents the highest percentage of females ever in the Irish Judiciary. There are currently 9 women judges of the Superior Courts, including a female Chief Justice. This represents over 20% of the 44 serving High Court and Supreme Court Judges, and in the Circuit Court the trajectory of female appointments is quite markedly upwards, since 19 judges representing over 43% of the Court's Judiciary are female. (Judicial Appointments Review Committee, 2014: para. 47).

Judicial Pathways – Formal and Informal

The existence of a formal career path that might lead to appointment at the higher level was not something that the research was able to uncover to any great degree.¹⁹ There was mention of a few individuals who, it was reported, seemed to have taken on judicial office at a relatively junior level but who were thought to have further ambitions. However this was not seen as a universally available career option, although it was suggested that it might be a good thing in that it, ‘would allow a wider range of people to demonstrate the appropriate competencies....[as] the part-time roles have the potential to do this’. As one focus group member put it, ‘If you shine in one tier you should have the opportunity to move up’. It was thought that this possibility might even encourage good applicants who would not otherwise think of a judicial career. A senior lawyer from the public sector made the point that, ‘a judicial pathway is the *key thing* ... I work in a sector where there are some extremely capable women but who have no perception of the possibility to be a part-time judge’. The creation of this possibility was felt to be an important attraction. Indeed this was seen by some as the best possibility of securing a female appointment in to the High Court. It was said that, ‘women have taken the route of ... coming up through the tiers, from other judicial jobs’ and that, ‘there are a large number of female applicants in the County Court who may well be where the next High Court judge comes [from]’. Indeed there was a view expressed widely that a series of appointments, moving up through the tiers of the judiciary to the County Court, might be thought to be an appropriate proving ground, and perhaps of at least equal validity to a career in the bar. As one respondent put it,

merit has to be real merit ... but if someone is a solicitor, a female in family work west of the Bann... they need a place to show that they can do the hard work, It is the County Court that is the place. They can progress from there.

Although the idea of a formal pathway to a judicial career that might take a judge up the rungs of the career ladder remains an uncertain although interesting possibility there was very little doubt among informants about the existence of an informal pathway to judicial preferment. It was widely reported in all the focus groups that there were a number of important attributes and career choices that were likely to have been made in order for a

¹⁹ ‘Judicial Career’ is a concept which appears as Recommendation 44 of the ‘Report of the Advisory Panel on Judicial Diversity 2010’ in England and Wales: ‘The concept of a judicial career is key to achieving progress on a more diverse judiciary... This means identifying clearer career paths so that those considering joining the judiciary understand their options and know how they can develop the skills and experience required to progress from one section of the judiciary to another.’ (Advisory Panel on Judicial Diversity, 2010).

candidate to appear meritorious. These were widely and easily recognised by informants. As one interviewee remarked that “it is funny how, irrespective of the existence of NIJAC, there are certain truths that are self-evident ... senior crown council will become a judge”. When pressed further on what this informal track might involve it was said, “you have access to the right sort of work ... if you’re known in the back corridor, if you’re Treasury Counsel, if your father was a judge ...”. Another informant characterized a successful candidate as someone who may well have been “vocal on the bar council or served on it ... very high profile, everyone would have heard of them”. Much of this idea of a career pathway was seen to be about networking and making the correct contacts, and much seemed to exclude women for structural reasons.

Various events including dinners and lectures were thought to be important. It was here that the necessary impressions can be made and the important contacts fostered. As one informant put it, “the person who has played at that level is going to have an advantage ... you have access to the right sort of work” and, crucially, “you know the judges”. This latter element - connections with the senior judiciary - is seen as particularly important, mainly in relation to access to appropriate consultees or referees. This was believed by some respondents to be a feature that impacts particularly on women. Women reported themselves to be less likely to network and less willing to ask judges for support.

It was felt that these informal career pathways are taken at a very early stage. As one young practitioner said, “It would be naive to say there are no pathways... if you look into any year group you can see that for some people the path is laid out before them, the connections are there”. The existence of these pathways was thought to be common knowledge: an interviewee said, “of course that goes on, there is evidence of that. Everybody knows that...”. (Indeed selection to the QC panel was mentioned frequently as being subject to a similar process, and here too a belief in informal pathways as significant was widely and firmly held.) The existence of this informal career path was not seen as providing the most open and accessible route to judicial office and it was felt to miss talent – particularly among women - who may not have chosen or been able to negotiate a way to the glittering prizes. As one informant put it, “NIJAC has been looking for other experiences, outside of work, so that flies in the face of what they are trying to do People who are on the inside track know how to fill in the form, know the buzz words... but others don’t”. There was a feeling

reported that relying on judicial insiders reporting on those that are known to them had the effect that experiences outside the informal career pathway were undervalued.

Conclusion: What Might Scepticism about Merit Mean for New Legal Spaces?

It is clear then that the legal profession as a whole is not entirely at ease with the present system for appointing judges, or perhaps more accurately it is not fully convinced that the appointments process is yet yielding the sort of judiciary that many would like, especially in the new circumstances that pertain in Northern Ireland. In particular there is concern that women are not being appointed to the highest level and this colours perceptions of the whole system. This feeling is fed by a notion that ‘merit’ can and should be seen in a wider context than it has been traditionally. Women – the group who suffer most from the present construction of merit – are, it was found, very much more liable to see the idea of merit in this wider manner than men (and public service lawyers and solicitors more likely to have this view than barristers, irrespective of gender).

These findings in terms of the socially constructed nature of merit are hardly novel. For example, it is a commonplace amongst researchers into judicial appointments that merit is a social construct and what constitutes merit is defined by relatively small elites. For example, Malleson has explored this where she notes that merit has been constructed around the needs of ‘certain preferred groups in a way which has unfairly advantaged them’ (2006: 136). In an argument that is very familiar within feminist approaches it can be maintained that this idea of merit, while posing as neutral, is in reality a strongly gendered concept.²⁰ The argument is that this concept of ‘merit’, and the method for assessing it, is at the heart of the failure of many women (not only in law but in many sectors of society) to advance to the upper reaches of professional life. This is not of course because women are not meritorious, but simply that merit is identified in a way which emphasises some attributes and minimizes the importance of others.

What *is* novel from the findings of this study is the strength of the view suggesting a growing realisation within the profession itself - particularly amongst women - that ‘merit is the problem’, and that there is no longer a consensus about how it is defined and the methods

²⁰ See eg Ruddick (1990); Gilligan (1982); Mackinnon (1989) and Fiorenza (2009).

used to assess it. This comes through in the high degree of scepticism found that merit would be rewarded in judicial appointments. As one of the interviewees noted, ‘there is a meritocracy but it’s *their* meritocracy ... that’s a fact of life’.

On one view of the findings all that might be necessary is some relatively minor re-working of the appointment process by the Northern Ireland Judicial Appointment Commission. This could provide a process resulting in a more appropriate and diverse judiciary for the new legal space that may be emerging in post-conflict Northern Ireland, and this might be sufficient to counter criticism. Such a process might involve, for example, a concerted effort to include more women in shortlists; an enhanced judge-shadowing scheme; a promotion process for incumbents in the lower to higher courts; or a drive to see more solicitors or public sector lawyers in the upper courts. However, it is contended that such steps alone are unlikely to be sufficient. There are a large number of challenges to the justice system in Northern Ireland which require a more fundamental rethinking of the kind of judiciary needed, and a radical re-working of the idea of ‘appointment on merit’. Further, it is maintained in what may seem initially as a paradoxical position, that discussions of merit in appointment need to be moved beyond gender precisely in order to achieve the sort of gender balance that is appropriate for a modern judiciary seeking the most talented judges. If we allow the current idea of ‘merit’ to remain unchallenged, and see the problem as only about how to move more women into this definition, change will be very slow, if it happens at all. Respondents in the focus groups may have initiated scepticism about merit, but this cannot be the final statement. NIJAC, and indeed the wider system, needs to become more involved in defining the notion of ‘merit’. There is a real need to think beyond what might take the ‘bad look’ off the profile of the present bench, and to realise that any new concept of merit properly considering the needs of the legal system for a changing world will undoubtedly result in more female judges – and much more besides.

As Northern Ireland moves forward to consider how the bench should be composed in the new legal space established in the post Agreement Northern Ireland it is important we do not listen only to the voices of those who are closely involved or have a direct interest in the answer. Indeed the inward looking perspectives of many respondents in the study was striking. They have to a very large extent viewed ‘the problem’ from their own perspective (that is as individuals building careers) and with little discussion or thought directed towards the needs of users of the legal system or the public at large who finance much of it. Certainly

although most respondents indicated that diversity would be ‘a good thing’, the diversity proposed from many respondents goes only so far. There seems to be little interest in appointing judges who might meet the current problems of the system directly: problems such as access to justice for the very large sections of the community who are losing or have lost the ability to utilize the court system through cost.²¹ A critical reader of the respondents’ views presented here might pose the question: what would this more diverse judiciary do to make the system better, fairer, cheaper, and more responsive to public need in Northern Ireland? From the information obtained from respondents it would seem it would do very little indeed. It seems that the judicial appointments system is, in reality, trying to resolve a small problem (that is female representation at the higher judicial levels) when a number of other larger ones which are present or becoming obvious are not being acknowledged. If these wider issues were to be faced up to this may well resolve the problem of diversity anyway.

It is important to be clear here. There is no wish to undermine the aim that women should be found more frequently in judicial roles. The argument rather is that a judicial appointments process which looks at the wider needs of the judicial system could be the most effective way in which to increase diversity, because it could lead to a judiciary where the skill set more closely matches those of all suitable applicants - male and female - possessing a whole range of attributes.²² That is to say, if merit could be redefined according to external need (rather than conditioned by internal professional structures) then diversity would surely follow and the legal system might better benefit the population which it is designed to serve.

This suggests that it is necessary to start thinking of the judiciary and the wider legal system as a *public resource*, and consider what the public might want or legitimately expect from the judiciary. It is unlikely that diversity will naturally flow from correcting particular under-representations in the system. Instead in order to achieve a real diversity it is necessary to change the perception of the judiciary and see it as a public resource acting in

²¹ In a way this mirrors the general reaction of much of the profession towards new funding regimes which have focused for the most part on how cutting legal aid will result in poorer quality representation rather than on more general issues of the unmet legal need. For the wider context of legal aid in Northern Ireland and the budgetary pressures pertaining there see *Access to Justice Review Northern Ireland: The Report* (2011) and the second part of the review promised for the end of 2015 (see further <http://www.dojni.gov.uk/index/access-to-justice-2.htm>).

²² Indeed as Joanne Conaghan has suggested, too much of a focus upon gender can not only take one’s eye off other factors, but can be just as oppressive (2000).

the wider interest and as delivering access to justice (rather than mainly reflecting the career development ladder within the legal professions). Paterson and Paterson's (2012) recent critique of the Supreme Court appointments system echoes some of this but also makes the point that merit should be seen in a more broadly contextual manner, taking into account the needs of the court as a body acting in the public interest rather than as a group of individual judges chosen as 'best' on the day. It is important to begin to consider more closely several elements of the judicial task:

- What is it that judges actually do (rather than what applicants for these posts do)?
- What is it that users of the court system want from judges (which they might not be currently getting)?
- How can judges contribute to reducing the expenditure on legal in Northern Ireland which currently runs at just under £2 million per week (Northern Ireland Legal Services Commission 2015)?
- What are the skill sets which are actually required for the judicial task?
- What is the role of the judge in ensuring effective case management and team work to deliver efficient access to justice?
- How exactly does it help the judicial process, or its perception, to have judges who are more 'reflective' of the broader community?

There has been some growing interest in this recently.²³ However much of this research has not attempted to test some the basic assumptions that have come to inform the appointments process whereby, for example, judicial skills are equated with High Court advocacy experience in complex cases such as leading barristers may have developed. The appointment process remains too concentrated on what an applicant has done within the career structure of the legal profession rather than on what he or she should be expected to do as a judge serving a wider interest.

This is perhaps the beginning of an exciting period in judicial studies. Researchers want to know much more about the roles which judges perform and how much of this involves the skills of technical substantive law in the traditional sense and how much the

²³ Other than early work such as that by Paterson (1982 and more recently in 2013) there has been only very limited research on the judicial role in the UK (see further Rock (1993; Darbyshire 2011; Thomas 2013 and the work of the ULC Judicial Institute at <http://www.ucl.ac.uk/laws/judicial-institute>).

resolution of relatively straightforward law and facts but with complex factors surrounding the wider public context. For example, in the new rights regime in Northern Ireland that Harvey discusses in this volume there may well be difficult issues of balancing a range of political (with both a small ‘p’ and large ‘P’) factors occurring within relatively straightforward legal contexts. Beyond this, a judiciary that is seen as a public resource would be alive to the whole range of other roles and tasks which might include: case management and ensuring value for money; public relations and making sure that although parties may leave court having lost, they feel they have been heard; assisting litigants in person, and pursuing the various values of justice for everyone in a context of declining legal aid and increasing costs. The list is nearly endless, but is surely worth building our knowledge about its contents. In Northern Ireland in particular, policy makers should be encouraging this inquiry. A most desirable side-effect will be a more diverse judiciary as well as perhaps a more effective one.

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